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No. 93-1501

Supreme Court, U.S.
FILED
APR 15 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

SHARON ANN ZIEGLER,

Petitioner,

v.

THE SUPREME COURT OF DELAWARE, et al., and THE BOARD OF BAR EXAMINERS OF THE STATE OF DELAWARE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF OF THE SUPREME COURT OF DELAWARE AND THE JUSTICES OF THE SUPREME COURT OF DELAWARE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 18, 1994

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13 pp

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The Supreme Court of Delaware and the Justices of the Court respectfully ask this Court to deny this petition seeking review of a judgment entered January 3, 1994 by the Supreme Court of Delaware. The state supreme court, exercising judicial functions in deciding petitioner's challenge to the ruling of the state Board of Bar Examiners that she had failed the 1993 bar examination, was not a party to the proceedings. Accordingly, neither the Supreme Court of Delaware nor the Justices of the Court are proper respondents before this Court. Petitioner has

also failed to show that the decision of the state court meets the finality requirement contained in the relevant jurisdictional statute.

JURISDICTION

Though petitioner asserts that the jurisdiction of this Court rests on 28 U.S.C. § 1257(a) (Pet. for Cert. at 2), she has not established that the January 3, 1994 decision of the Supreme Court of Delaware is a final judgment within the terms of § 1257(a). *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 71 (1948). As a result, this Court lacks jurisdiction over the petition for a writ of certiorari.

COUNTER-STATEMENT OF THE CASE

In 1991, petitioner Sharon Ann Ziegler graduated from law school and in that year was admitted to practice in Pennsylvania. The following year, she sat for the Delaware bar examination; though passing the professional ethics examination and the Multistate Bar Examination, she failed the portion of the examination consisting of 12 essay questions. In 1993, Ziegler again applied to sit for the examination. In early June 1993, in a character interview with a bar examiner, Ziegler covertly taped the interview without the examiner's knowledge. Pet. for Cert. at 4.

The examination was administered in July 1993, and in October 1993, the Board of Bar Examiners advised Ziegler that she had achieved a passing score on the

Multistate Bar Examination, but had failed to reach the passing score of 65 on the essay questions. Ziegler applied to the Board for review of five of her answers to the essay questions, and on that review, her score for the essay questions was raised from 63.75 to 64.17. However, Ziegler's score still fell below the passing score of 65, and the Board denied her request for reconsideration in November 1993. Pet. for Cert. at 5.

In December 1993, Ziegler petitioned the Supreme Court of Delaware for review of the Board's decision. According to her, the Board's system for the grading of the answers to the essay questions was arbitrary. In addition, she charged that the Board had violated her procedural due process rights when refusing to disclose to her the examiners' grading criteria and notes. She also contended that the Board could not grade her examination papers and then sit in judgment on her petition for reconsideration. In support of her claims, she referred to excerpts of her June 1993 interview with one of the examiners that she had secretly recorded. Pet. for Cert. at 5-6.

While Ziegler's petition for review was pending, one Justice of the Court, the Honorable Joseph T. Walsh, entered his disqualification on the docket. Pet. App. at A5. Contrary to the incomplete and misleading description of events in Ziegler's petition for certiorari, the records of the state supreme court reflect that the entry of Justice Walsh's disqualification was an error. Albeit after the decision of the Court denying Ziegler's petition for review, a decision in which Justice Walsh had fully participated, the error was corrected on the Court's docket, and the Clerk notified Ziegler and counsel for the Board of Bar Examiners that "the disqualification was erroneously

entered on the docket" and "Justice Walsh was not, in fact, disqualified in the matter." Resp. App. 1.

After the Board had answered the petition for review, the Supreme Court of Delaware summarily denied the petition. Pet. App. at A1-A4. In addition, the Court noted "with much concern" Ziegler's surreptitious recording of her interview with the bar examiner, observing that while the recording was "technically legal in Delaware, such conduct is professionally improper." Pet. App. at A2. Given the impropriety of the covert recording, the Court remanded the case "to the Board of Bar Examiners for a thorough investigation into [Ziegler's] character and fitness." Pet. App. at A4.

REASONS FOR DECLINING REVIEW

1. The Supreme Court of Delaware and the Justices of the Court Are Not Proper Respondents in This Proceeding.

Only this Court can review final determinations of the Supreme Court of Delaware in judicial proceedings. *E.g., District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476, 486 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415, 416 (1923). In turn, there can be little doubt that the action of the Supreme Court of Delaware in denying Ziegler's petition for review was a judicial proceeding. Indeed, the decisions of this Court in *Feldman* and *In re Summers,* 325 U.S. 561 (1945) leave no room for argument of the point. The court in *Feldman* had refused to waive the requirement that applicants have graduated

from a law school approved by the American Bar Association (460 U.S. at 465-68); the state court in *Summers* had refused to admit the applicant because he was unable to take an oath to support the state constitution (325 U.S. at 562). In each case, the respective courts had adjudicated claims of a present right to admission to the Bar, being required "to investigate, declare, and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist.' " *Feldman*, 460 U.S. at 479 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908)). The Supreme Court of Delaware was similarly required to determine, under the existing law and in light of Ziegler's arguments, whether her petition challenging the Board's action should be granted. When the state court issued an order refusing the petition for review, "it determined as a legal matter that [Ziegler] was not entitled to be admitted to the bar. . . . The court had adjudicated [her] 'claim of a present right to admission to the bar' and rejected it. This is the essence of a judicial proceeding." *Feldman*, 460 U.S. at 480-81 (citation omitted).

Because the state court proceedings in this case were judicial in nature, the proper respondent before this Court is not the Supreme Court of Delaware or the individual Justices. Instead, examination of the proceedings in the state court reveals the correct respondent. *See Karcher v. May*, 484 U.S. 72, 77-78 (1987); *Diamond v. Charles*, 476 U.S. 54, 62-64 (1986). In the state court, there was an adversary proceeding in which the Board of Bar Examiners appeared to oppose Ziegler's petition for review. The Board, appearing as the adverse party in the state court, must be viewed as the correct respondent in

this Court. *See Karcher*, 484 U.S. at 77. Conversely, because the Supreme Court of Delaware and the individual Justices of the Court were exercising judicial functions, neither the Court nor its members could be a party to the proceedings on Ziegler's petition for review.[1] Not being a party to those proceedings, the Supreme Court of Delaware and the Justices of that Court can not now be parties before this Court. *See Karcher*, 484 U.S. at 77 ("we have consistently applied the general rule that one who is not a party or had not been treated as a party to a judgment has no right to appeal therefrom.").

The proceedings in *Summers* do not compel a different view. Though this Court eventually ruled otherwise, the state court had not treated the bar application proceeding as judicial, asserting that the denial of the application for admission was a ministerial act. *In re Summers*, 325 U.S. at 563, 565-66. *See Feldman*, 460 U.S. at 477-78. Given the premise under which the state court had acted, the Justices of the Illinois Supreme Court correctly perceived themselves as being the proper respondents. *See also Feldman*, 460 U.S. at 485-86. In Ziegler's case, there is no doubt that the proceedings of the Supreme Court of Delaware were judicial in nature. *E.g., Feldman*, 460 U.S. at 480-81. Ziegler's act of listing the Supreme Court of

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[1] *E.g., McCloskey v. Renfro*, 57 P.2d 1140, 1140 (Ariz. 1936); *Gilliam v. Etheridge*, 21 S.E.2d 556, 557-58 (Ga. App. 1942); *State ex rel. Hurley v. Zoning Board of Appeal and Adjustment*, 4 So.2d 822, 823 (La. 1941); *People ex rel. Steward v. Board of Railroad Commissioners*, 54 N.E. 697, 699 (N.Y. 1899); *Bowles v. Dannin*, 2 A.2d 892, 893-95 (R.I. 1938). Ziegler implicitly recognizes this principle, noting the parties involved in the case before the state supreme court were "herself and the Board." Pet. for Cert. at ii.

Delaware and the Justices of the Court as respondents in the petition for certiorari does not transmute the Court from the judicial body which decided the controversy into a party. The petition should therefore be denied as to the Supreme Court of Delaware and the individual Justices.

2. The Petition Should Be Denied Because Ziegler Has Not Shown That the Decision of the State Supreme Court Is A Final Judgment.

In Ziegler's case, the Delaware Supreme Court summarily dismissed her petition for review, but based on her covert recording of a character interview with a bar examiner, the state court remanded the case to the Board of Bar Examiners for further proceedings. Pet. App. at A4. In order to invoke this Court's jurisdiction, Ziegler must show that the decision of the Delaware Supreme Court is final. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 71 (1940), 28 U.S.C. § 1257(a). Orders, such as the one issued in Ziegler's case, that remand the case for further proceedings do not satisfy the finality requirement of § 1257(a). *E.g., Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982) (decision remanding for further proceedings after state supreme court rules valid state law struck down by trial court); *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (decision remanding case for trial); *Uphaus v. Wyman*, 360 U.S. 72, 75 (1959) (decision that on remand, trial court is to exercise its discretion in ruling on a petition to enforce investigative subpoena). Ziegler, though citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), fails to explain how her case fits within any of the four categories of cases, described in *Cox Broadcasting*, in which the state

court decision is final under § 1257, notwithstanding further proceedings in the state courts. Since Ziegler has not established that the decision of the state supreme court is final, the petition should be denied. *Republic Natural Gas*, 334 U.S. at 71 ("The policy against premature constitutional adjudications demands that any doubts [about finality] be resolved against jurisdiction."). *See Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975) (important purpose of finality requirement "is to prevent [Court's] interference with state proceedings when the underlying dispute may be otherwise resolved").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 18, 1994

APPENDIX

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February 17, 1994

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CLERK

William J. Wade, Esquire
Chairman
Board of Bar Examiners
200 W. 9th St., Suite 300
Wilmington, DE 19801

Re: In re Petition of Ziegler, No. 438, 1993

Dear Mr. Wade:

At the direction of the Court, I am writing to advise the Board that Justice Walsh's disqualification was erroneously entered on the docket by the Clerk's office in the above captioned matter. Justice Walsh was not, in fact, disqualified in the matter. In addition, I am enclosing a copy of a letter which was purportedly written by Ms.

Ziegler and which appeared in the January 31 – February 6 edition of the Delaware Business Review.

Very truly yours,

/s/ Margaret L. Naylor

Enclosure(s)

cc: Henry N. Herndon, Jr., Esquire
(with copy of enclosures)
Josy W. Ingersoll, Esquire
(with copy of enclosures)
Ms. Sharon Ann Ziegler
(with copy of enclosures)